12-8-1975

Kentucky National Guard v. Larry Bayles Workmen's Compensation Board

Appellee's Brief 1975-SC-0857

APPELLEE'S BRIEF

535 SW 2d 234

COURT OF APPEALS OF KENTUCKY

File No. 75-857

KENTUCKY NATIONAL GUARD — APPELLANT

VS. APPEAL FROM WARREN CIRCUIT COURT
HON. THOMAS W. HINES, JUDGE

LARRY BAYLES
WORKMEN'S COMPENSATION BOARD — APPELLEE

BRIEF FOR APPELLEE

KELLY THOMPSON JR.
COUNSEL FOR APPELLEE

This is to certify that a copies of this brief were served upon the Trial Judge, Hon. Thomas W. Hines by mailing a copy thereof to him at the Courthouse, Bowling Green, Kentucky 42101; and upon appellant herein by mailing a copy thereof to Hon. Leonard S. Price, P. O. Box 1464, Louisville, Kentucky 40201; and also to appellee, Hon. William L. Huffman, Director, Workmen's Compensation Board, Capitol ~~Plaza~~, Frankfort, Kentucky 40601. This the 8 day of December, 1975.

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ATTORNEY FOR APPELLEE

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MAY IT PLEASE THE COURT:

COUNTERSTATEMENT OF THE CASE AND EVIDENCE

The appellee, Larry Bayles, enlisted in the Army and after two years was released early if he would join the National Guard (W. C. Trans., pp. 56, 57). At the time of his release from the Army, Bayles was promised that he would not be called to annual training (W. C. Trans., pp. 56, 57).

When Bayles joined the National Guard in Bowling Green, Kentucky, there was a notice conspicuously posted on the bulletin board of the armory which stated that the above named employer, which was the Kentucky National Guard, had accepted the provisions of the Workmen's Compensation Act (W. C. Trans., pp. 228).

Contrary to the army's promise, he was ordered by his Commanding Officer in the National Guard, Captain Jack Jeanette, under the authority of the Adjutant General and the Governor of Kentucky, to annual training for summer camp at Camp Lejume, North Carolina (W. C. Trans., pp. 56-57). The unit assembled in Bowling Green and Larry Bayles left Bowling Green driving the Company Commander Jack Jeanette in an Army vehicle to North Carolina (W. C. Trans., pp. 62-63). After arriving in North Carolina, Bayles could

not leave the tent camp which the Kentucky unit erected and he stayed continuously under his commander's control until they returned to Kentucky (W.C. Trans., pp. 63).

At the camp, Bayles was injured and permanently disabled (W.C. Trans., pp. 6). He was then transported to Fort Knox, Kentucky for treatment (W.C. Trans., pp. 67). On July 13, 1973, Bayles was released by Dr. McCartee, discharged, and all benefits and compensation to Bayles ceased (W.C. Trans., pp. 26). However, he was not released by Dr. Carson, who continued treatment (W.C. Trans., pp. 98).

The army and the National Guard will not pay Dr. Carson for his services after Bayles's discharge from the National Guard on July 13, 1973 (See Motion to Require Payment of Dr. Carson's fees in Circuit Court, W.C. Trans., pp. 8). Bayles, owing Dr. Carson and suffering from a disability, inquired of his company commander if any compensation was available (W.C. Trans., pp. 72). The commander informed him he could not get anything (W.C. Trans., pp. 72).

Bayles then filed an application for adjustment of claim with the Workmen's Compensation Board for his injury.

The appellant then filed a Motion to Dismiss alleging the same grounds the appellant has raised on this appeal. The Board ruled to hold Bayles's claim in abeyance, requesting that the appellant substantiate his arguments with proof. The appellant took proof and renewed its Motion to Dismiss on February 12, 1974.

The appellee argued that the appellant's proof was inadequate because the appellant's witness admitted he was not an expert on this conflict of laws nor had the witness had any expertise with Federal disability compensation claims (W.C. Trans., pp. 29).

The Board ruled to pass this claim to the merits and during the taking of proof, Bayles proved that he was injured and permanently disabled (W.C. Trans., pp. 6).

The appellant deposed three more employees of the defendant employer who all recited the same interpretation of covered status as the first witness (Birdwhistle) had recited (W. C. Trans., pp. 206). No witness deposed by the appellant could cite any written authority from where they had obtained this interpretation (W. C. Trans., pp. 204).

One witness, Sanders, when asked what A.R. (Army Regulations) he could cite to substantiate his opinion answered stating that A.R.s were not used by the National Guard (W. C. Trans., pp. 204). This was refuted by Captain Frank Van Fleet who stated that A.R.s are in virtually every National Guard armory in this state. (W. C. Trans., pp. 227-228). All witness deposed by the appellant admitted that they had no background and expertise in federal disability compensation.

After due consideration, the Workmen's Compensation Board ruled that Bayles was covered by the Workmen's Compensation Act and judged him 25% disabled.

The appellant appealed to the Warren Circuit Court which affirmed the Board's decision but ruled that the dollar amount was incorrect because Bayles's salary at the time of the injury was insufficient to justify the maximum award. The Circuit Court also denied the appellee's Motion to Require the Defendant to Pay during Appeal Dr. Carson, for his medical services rendered to the appellee, Bayles.

From this decision the appellant again appeals.

ARGUMENT

I. ALL MEMBERS OF THE KENTUCKY NATIONAL GUARD UNDER ORDERS BY THE GOVERNOR OR ADJUTANT GENERAL OF THE KENTUCKY NATIONAL GUARD FROM THE YEARS 1965 THROUGH 1974 WERE COVERED BY THE KENTUCKY WORKMEN'S COMPENSATION ACT.

The appellant states in his first paragraph under Argument II that the question on this appeal is whether the appellee Bayles was an employee of the State of Kentucky at the time of this injury. We shall reach that issue firmly later in this brief but with the court's indulgence, we would like to discuss the legislative history of the various acts which affect this question.

In 1965 the Kentucky legislature passed KRS 38.235 which states:

KRS 38.235 (1)

> The department of Military Affairs shall accept the provisions of KRS Chapter 342 for the benefit of members of the Kentucky National Guard while such members are on active state service.

In 1965 at the time of passage of KRS 38.235, KRS 31.010 defined active state service:

KRS 38.010 (4):

> Active state service is:
> (a) the ordering by the governor of any unit or units of Kentucky National Guard to enforce the laws of the Commonwealth; resist an actual or threatened invasion or insurrection; quell a riot or other domestic disturbances; or preserve and protect the rights, lives, and property of the citizens of the Commonwealth;
> (b) officers, warrant officers or employed personnel employed under orders of the governor in making tours of inspection, mustering in or mustering out troops, making surveys of military property, sitting on court marshals, summary courts, efficiency boards, courts of inquiry or boards of officers or *performance of any other duty directed by the governor or adjutant general.* (Emphasis supplied);
> (c) the participation of any unit or units of Kentucky National Guard in gunnery competition or other training or military exercise anywhere within or without the United States.

In 1970 the legislature, in house bill 235 amended Subsection c of KRS 38.010 by adding on the words "except when entitled to federal pay":

KRS 38.010 (c):

> The participation of any unit or units of the Kentucky National Guard in gunnery competition or any training or military exercise anywhere within or without the United States *except when entitled to Federal pay.* (Emphasis supplied)

Nowhere within the house journal, the Senate journal or the Kentucky Acts is the term or the words Workmen's Compensation mentioned in regard to house bill 235. It is the contention of the appellee that house bill 235 was passed soon after a member of the Maryland National Guard had flown his airplane into an airliner, thus bringing tort claims against the state of Maryland in regard to the negligence of this member of the Maryland National Guard and that house bill 235 was an attempt to limit the state liability for tortious acts by members of the Kentucky National Guard.

In 1972 the legislature passed the Omnibus Workmen's Compensation Act and without changing the words moved KRS 38.010 (b) into Chapter 342 in 342.640 Subsection 3:

KRS 342.640 Subsect 3:

> "Every person who is a member of the Kentucky National Guard whild said member is on active state service . . ."

In 1974 after the date of this injury the legislature passed KRS 38.010 redefining active state service into the definition now argued by the appellant. However, the injury which is the subject of the claim occurred in 1973 and is not subject to the 1974 revision of KRS 38.010.

Appellant's witnesses admitted little knowledge of the Kentucky Revised Statutes. Perhaps their interpretation came from this new statute, not in effect or applicable to this injury, since their depositions were taken after the passage of KRS 38.010. Also, the appellant's witnesses exhibited an order activating units of the Kentucky National Guard to state service. However, this order was under the new law, KRS 38.010, and not under the old law, KRS 38.010, before the 1974 amendment.

Provisions of the United States Code also apply to this situation. U. S. Code Title 32 Section 318 is cited by the appellant as providing for compensation for a member of the National Guard called or ordered to active duty under 32 U. S. Code 502, 503, 504, or 506. However, this U. S. Code provision was in existence in 1965 and therefore was within the knowledge of the Kentucky Legislature, when they passed KRS 38.235 extending Workmen's Compensation coverage to all members of the Kentucky National Guard under orders of the governor or adjutant general.

We ask the court to examine the revision note to 32 U.S.C. Sec. 318 which demonstrates that this section does not apply to U.S.C. definition of active duty as the appellant contends:

> 32 U.S.C. 318 (2) Revision Note:
>
> The words active duty are omitted since persons do not perform active duty in the sense in which that term is defined in Section 101, No. 12 of this title in their status as members of the National Guard.

Other relevant U.S.C. provisions are quoted in the case of Spangler v. United States 185 F. Supp. 531 which is quoted below:

CASE LAW

There is no case law in Kentucky on this issue. Many states have reached this issue and have ruled that the Workmen's Compensation coverage is in effect for those states. Federal Tort claims cases discuss the employment status of members of the National Guard in relation to the states and to the federal government. In Gross v. United States 177 F. Supp. 767, it is stated:

> The issue presented is whether persons engaged in said review were employees of the government, acting within the scope of their employment.
>
> It is not disputed that the said unit was participating in training under provisions of Air National Guard Regulation 50-02, dated October 1, 1956, and in accordance with a directive of the Governor of the State of New York and that the unit was not in active Federal service and that the place of the accident was under the exclusive control of the said unit and that the members of the unit received compensation from the government, pursuant to 32 U.S.C. Subsection 503. (Emphasis supplied)

The law is well settled that members of the National Guard of the various states are State employees except when in the actual service of the United States. Storer Broadcasting Company v. United States, 5 Cir., 251 F. 2d, 268, certiorari denied 356 U.S. 951, 78 S.CT. 916, 2 L.Ed 2d 844.

Spangler v. United States defines when a member of the National Guard is in the active service of the United States:

> "It is plaintiff's contention that since the unit of the Ohio National Guard of which Sergeant Dickey was a member was on the two week active duty for training period, Sergeant Dickey was, during that two week period, an employee of the Federal Government within the terms of the Federal Tort Claims Act.
>
> Plaintiffs argue that the Federal Government is liable because Title 10 U.S.C.A. Section 101 (22) reads as follows:
>
> " 'Active duty' means full-time duty in the active military service of the United States. It includes duty on the active list, full-time training duty, annual training duty * * *." . . .
>
> After examining the above quoted statutes, the Court answers plaintiffs' argument by noting that Title 10 U.S.C.A. Sections 3495 and 3500 and Title 50 U.S.C.A. Appendix, Section 451 speak of "active Federal service" and "Federal service" and not "active duty." The fact that plaintiff was on active duty is not equivalent to being in "active Federal service."
>
> This Court is led to the conclusion that a member of the National Guard, which has not been ordered into the active Federal service, even during the two week active duty for training period as provided for in Title 10 U.S.C.A. Section 672 (b) and Title 32 U.S.C.A. Section 502 (a), is not an employee of the United States Government. . ."

We ask the court also to review Sadowski v. State 274 N.Y.S. 2d 368 wherein a claimant in the State court of claims contended that he could sue the state of New York for negligence while he was participating at a summer camp and where the claimant contended that he was an employee of the U. S. Government and evidenced his pay voucher showing that he was paid by the U. S. Government at the time of the injury:

> Furthermore, any compensation received by claimant from the military authorities of the United States, is merely an accomodation between the Federal Government and the several State governments in and for their maintaining the State National Guard, and creates no special relationship between the Guardsman and the United States Military Service when not ordered or impressed into Federal service.

In this case, the state of New York ruled that an employee injured while he is in the active service of the employer is limited to compensation under Workmen's Compensation Act and may not sue his employer, ruling that the state of New York was his employer and not the Federal Government even though this employee received his pay from Federal authorities.

II. THE APPELLEE, LARRY BAYLES, AS AN INDIVIDUAL WAS ON ACTIVE STATE SERVICE AT THE TIME OF HIS INJURY.

The appellee, Larry Bayles, was on active state service at the time of his injury because there is no legal federal authority to order him to this summer encampment. The appellee, Larry Bayles had been promised by the army when he agreed to transfer to the National Guard that he would never be called to summer camp, the reason was U. S. Code Title 32 Section 502 Subsection 2 (1975 Pocket Supplement):

> ". . . participate in training at encampments, maneuvers, outdoor target practice or other exercises at least 15 days each year. <u>However, no member of such unit who has served on active duty for one year or longer shall be required to participate in such training if the first day of such training period falls during the last 120 days of his required membership in the National Guard.</u> (Emphasis supplied)

In this case, the appellee Bayles was ordered to annual training, however, the first day of the training fell within the last 120 days of his required membership in the National Guard. In this case, the first day of this training was in March, 1973. Bayles's membership in the Kentucky National Guard would have expired on April 24, 1973; thereby clearly excluding him from the Federal authority for annual training.

However, Bayles was still included on annual training on KRS 38.250 Section 1:

> Every unit of the Kentucky National Guard shall assemble for drill instruction not less than 48 times each year and shall <u>participate in encampments, maneuvers, or other exercises the last 15 days in each year unless excused therefrom by the governor.</u> The number present in order to obtain credit for drill period or time in a time of instruction shall be such as prescribed by the governor.

Therefore, there was no Federal authority to order Bayles to this summer camp. Bayles was faced with the alternative to disobey an illegal Federal order but he would have been charged with failure to obey a legal state order. The evidence in the record all proves that Bayles's unit was not excluded from the requirement of KRS 38.250 by the governor and therefore Bayles was under a legal Kentucky authority in ordering him to this summer camp.

Further, conspicuously posted on the bulletin board of the armory of the unit to which Bayles was assigned was the following notice:

> "A form for giving notice of employer's acceptance of compensation act: to be posted conspicuously about the place of business.
>
> Form No. 3. Notice: Commonwealth of Kentucky has accepted the provisions of the Kentucky Workmen's Compensation Act and will operate State government thereunder on and after the first day of July, 1965.

This notice was signed by the adjutant general of the Kentucky National Guard. This notice was on the bulletin board conspicuously posted throughout the time of Bayles's duty with the National Guard and at the time of his injury with the National Guard.

It is contended by the appellee that when Bayles signed his employment contract with the Kentucky National Guard at Bowling Green, this notice was conspicuously posted on the bulletin board and therefore became an implied term of said contract.

In this contract, the amount of compensation was not even included, therefore, denoting that many terms of this contract are implied. It is submitted that a notice on the bulletin board of the place of employment to this effect creates an implied provision to this agreement.

Kentucky has long held implied provisions to contracts (See King v. Ohio Valley Terminex Company 214 SW 2d 993, 309 Ky. 35 - Warfield Natural Gas Co. v. Allen 59 SW 2d 534, 248 Ky. 646 - Humphries v. Central Kentucky Natural Gas Co., 229 SW 117, 190 Ky. 733).

CONCLUSION

Appellee Bayles was in North Carolina under an Order issued under the authority of the Adjutant General of the Kentucky National Guard and the Governor of Kentucky. He was therefore entitled to covered status under 1973 KRS 38.010 (4) (b).

1970 House Bill 235 did not amend KRS 38.010 (a) or (b) but did amend subsection (c).

Appellee Bayles was an employee of the State of Kentucky at the time of his injury.

The appellee therefore respectfully moves that the judgment of the Workmen's Compensation Board and the Trial Court be affirmed.

Respectfully submitted,

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